86-1244

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STONEY GENE GOLDEN,

Petitioner,

v.

CLARENCE W. DUPNIK, Sheriff
of Pima County, Arizona,

Respondent,

and

THE STATE OF ARIZONA,
Real Party in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

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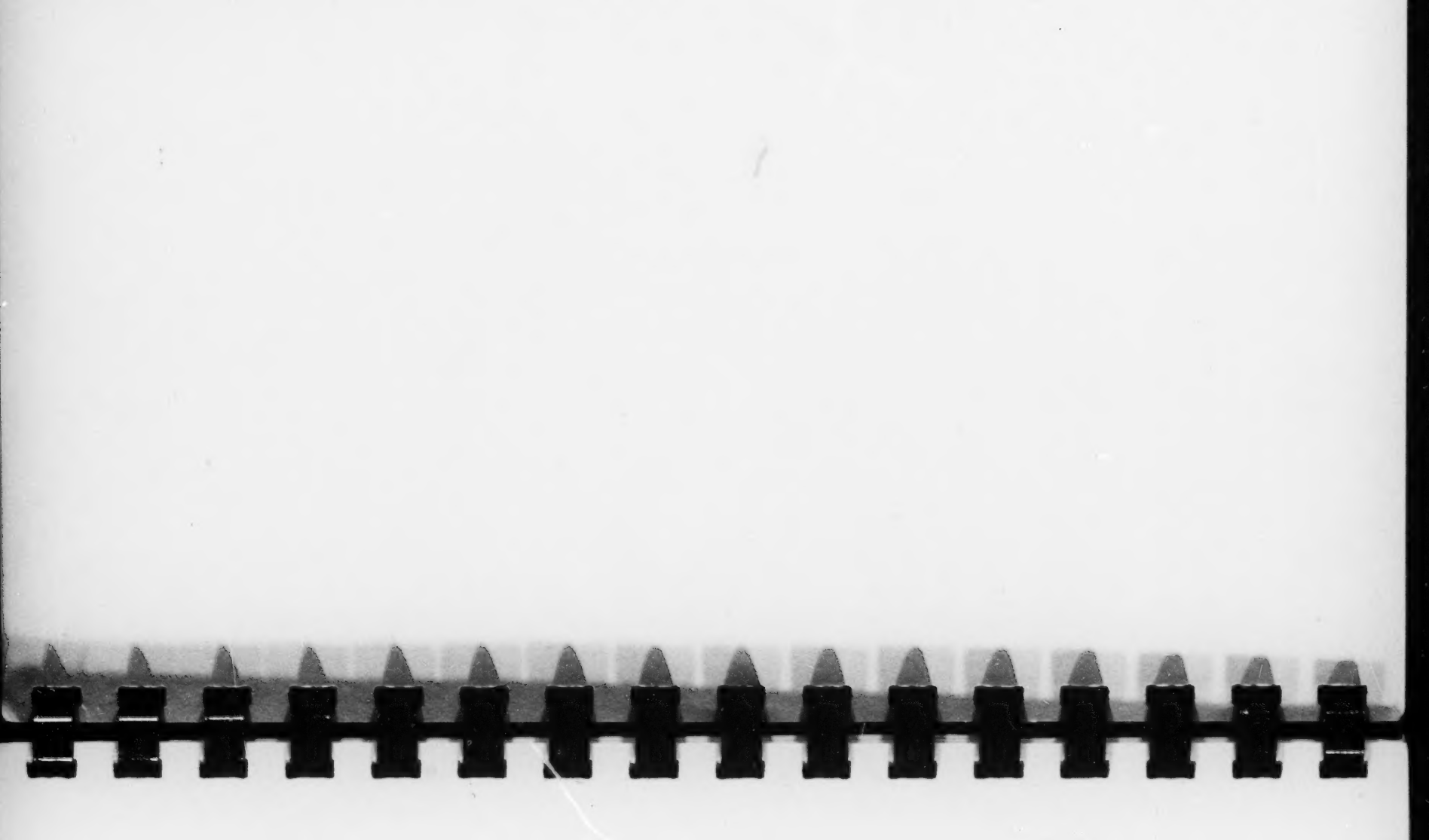

I

QUESTIONS PRESENTED

A. Whether the Petition for Writ of Habeas Corpus was erroneously denied since the arrest warrant was jurisdictionally fatally defective in that it was issued by a judge who has a personal interest in the outcome of the proceedings thereby violating Petitioner's fundamental federal constitutional rights of due process.

B. Whether the Petition for Writ of Habeas Corpus was erroneously denied since the arrest warrant was jurisdictionally fatally defective in that it is being prosecuted by a County Attorney who has a direct and personal interest in the outcome thereby violating Petitioner's fundamental constitutional rights.

C. Whether the Petition for Writ of Habeas Corpus was erroneously denied since the arrest warrant was jurisdictionally fatally defective in that the supporting Divorce Decree upon which the crime was alleged is void.

D. Whether the Petition for Writ of Habeas Corpus was erroneously denied since the arrest warrant does not substantially charge a crime under Tennessee laws.

E. In Determining whether the arrest warrant is valid for purposes of extradition, whether a court should also consider the web of other improprieties surrounding the issuance of the warrant.

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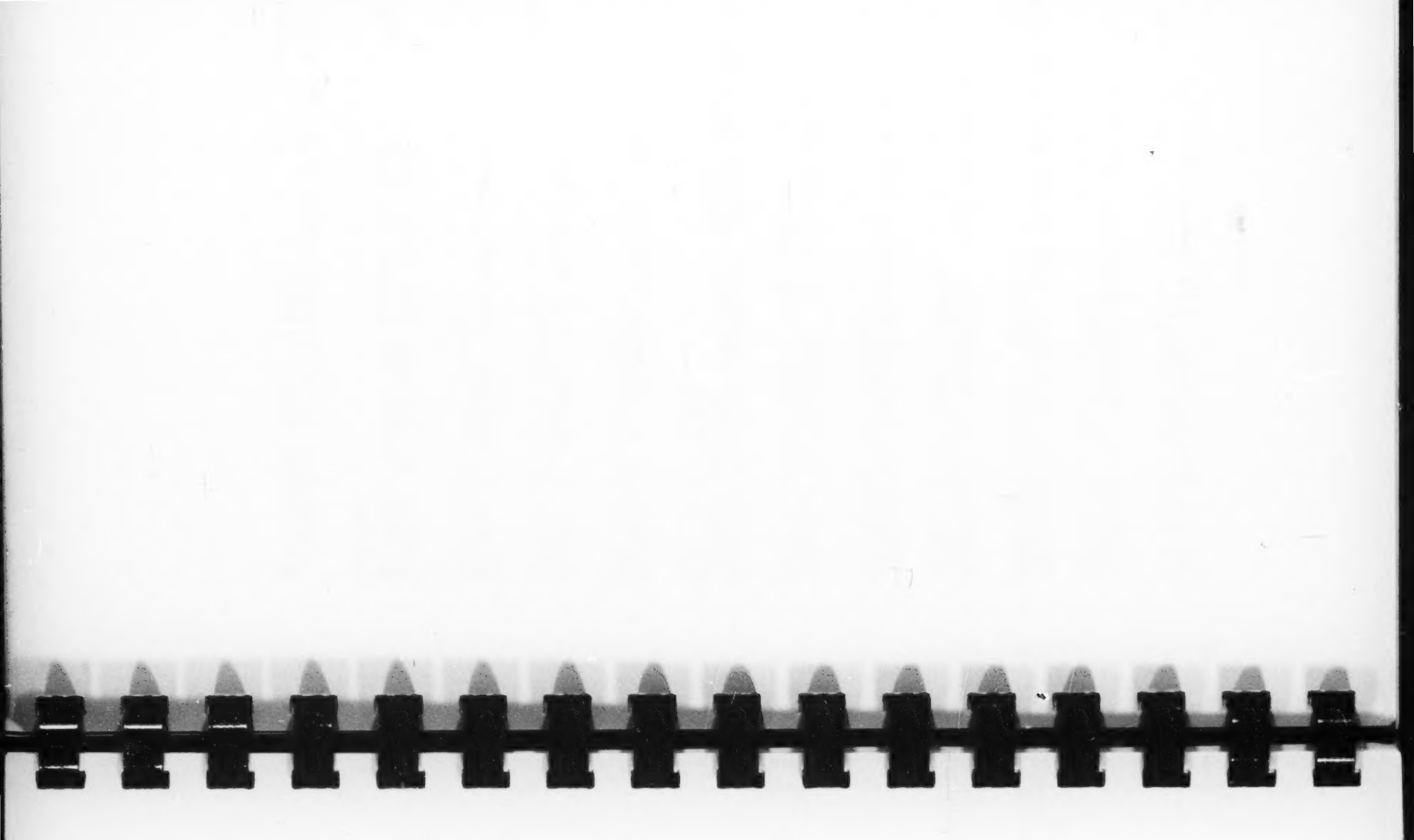

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**PETITION FOR A WRIT OF CERTIORARI
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Opinion Below

The Opinion of the Arizona Court of Appeals is set forth in the Appendix attached herein, pages A-2 through A-18.

This Opinion was denied review by the Arizona Supreme Court as is set forth in the Appendix attached herein, page A- 1.

Jurisdiction

The Petitioner herein seeks review of the Opinion and Order of the Arizona Court of Appeals rendered on May 22, 1986, and subsequently denied review by the Arizona Supreme Court on October 5, 1986. By denying the Petition for Review, the Arizona Supreme Court let stand the lower court's ruling denying Petitioner's Petition for Writ of Habeas Corpus. In effect, this ruling permits a State to proceed with extradition proceedings despite underlying defects in the foundation upon which such proceedings are based. In the instant case, an arrest warrant was issued by a judge and prosecuted by a county

attorney, both of whom had personal interests and undisputed biases in the outcome of the original proceedings. Further, to the extent the arrest warrant charged a violation of non-existent statute at the time of its issuance, an issue exists as to whether it may substantively charge a crime. A substantial question also exists as to whether or not Petitioner can be charged with a crime the elements of which are dependent upon a valid custody order where a court did not have proper jurisdiction in the first instance to render such an Order. By acting in disregard of these issues, Petitioner alleges that his rights pursuant to the United States Constitution were violated.

The Court's jurisdiction to review the Arizona Supreme Court decision by Writ of Certiorari is conferred by 28

U.S.C. Section 1257(3).

Constitutional Provisions Involved

1. The Fourth Amendment to the Constitution of the United State.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

2. The Fourteenth Amendment to the Constitution of the United States.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Article VI, The Supremacy Clause of the Constitution of the United States.

> This Constitution and the Laws of

> the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

4. Other relevant federal statutes are:

> 28 U.S.C. Section 1257(3)
> 28 U.S.C. Section 1738(A)

Statement of the Case

This Petition comes before this Court as a request to review an Order of the Arizona Supreme Court which denied Petitioner's request for review of a decision and opinion of the Arizona Court of Appeals.

STONEY GOLDEN is the natural father and CANDIE GOLDEN, a/k/a CANDIE TAYLOR, but referred to herein as CANDIE GOLDEN or MRS. GOLDEN, is the natural mother of CHASEY GOLDEN, a male child, born on December 28, 1979. STONEY GOLDEN and

CANDIE GOLDEN were married in Tennessee on September 12, 1979. On May 22, 1982, STONEY GOLDEN, CANDIE GOLDEN and CHASEY GOLDEN were residents and domiciliaries of the State of Florida where they had resided for approximately 10 months upon relocation from the State of Tennessee, along with STONEY's brother and parents.

On May 20, 1982, the elder Goldens, who had also moved the family jewelry business to Florida, made plans for a two day trip to Tennessee to finish up some of their business affairs there. With the permission and consent of both CANDIE and STONEY GOLDEN, the elder Goldens took CHASEY GOLDEN with them with the intent of returning within a few days. With the knowledge of both STONEY and CANDIE, the elder Goldens stopped for the night in Alabama to stay with relatives. In the middle of the night of May 20, 1982,

CANDIE GOLDEN, without the knowledge or consent of STONEY GOLDEN, fled from the State of Florida, stopped in Alabama, physically removed the child from the care of the elder Goldens and arrived in Tennessee.

On May 21, 1982, less than twenty-four hours after leaving Florida, CANDIE GOLDEN, who had been living in Florida for the preceding ten months, filed a Complaint for Divorce in Franklin County, Tennessee seeking custody of the minor child. Tennessee has a six month residency requirement. Florida would have had jurisdiction. The Tennessee Court records indicate that the Complaint admits STONEY GOLDEN was not a resident of Tennessee, but instead, a resident of Panama City, Florida. STONEY GOLDEN was sent a non-resident notice by certified return receipt mail. STONEY GOLDEN

conferred with Florida counsel at the time all of whom were either unwilling or unable to litigate the action once the action in Tennessee had commenced. Faced with that STONEY GOLDEN journeyed back to Tennessee for the sole purpose of defending in the divorce action and to obtain custody of his minor child.

While in Florida, STONEY GOLDEN, through counsel, obtained the sworn statements of four witnesses who testified as to the residence of CANDIE, STONEY and CHASEY GOLDEN in the State of Florida for the period of time immediately preceding the filing of the Petition for Divorce in Tennessee. In addition there was a notarized statement from STONEY GOLDEN's employer and other documents verifying STONEY GOLDEN's employment and CANDIE GOLDEN's employment in the State of Florida.

Despite the lack of jurisdiction over either STONEY or CANDIE GOLDEN, the Tennessee Court dissolved the marriage on August 20, 1982, and in so doing, awarded custody of the minor child to MRS. GOLDEN. The Decree itself makes no finding of jurisdiction of the Tennessee Court.

The entire divorce action was marked by unfairness and bias. The strongest example of this is the representation by Mr. Joe Bean of MRS. GOLDEN. On two previous occasions, Mr. Joe Bean had represented STONEY GOLDEN. Mr. Bean used information obtained from the confidential attorney-client relationship against MR. GOLDEN in the divorce action. Documents in this Court's file indicate that MR. GOLDEN complained about this unfairness, that MR. GOLDEN's counsel insisted that Mr.

Bean withdraw, that Mr. Bean refused, that the Judge knew about the conflict of interest but that nothing was done. Ultimately bar disciplinary proceedings were instituted against Mr. Bean; however, he died before a decision was reached.

During the time that CANDIE GOLDEN had custody of the minor child, MR. GOLDEN observed abuse and neglect of the minor child. This abuse occurred while the minor child was in the care of Lonnie Taylor and his other children. Lonnie Taylor is CANDIE GOLDEN's step-father. One of the step-brothers living in the home was retarded and abusive. At one point the minor child had been cut with a knife between toes on both feet. He had been held down while this occurred by the retarded step-brother. On numerous occasions, STONEY GOLDEN observed cuts

and bruises on the child which the child attributed to Lonnie Taylor and the step-brother.

STONEY GOLDEN did everything he could within the context of the system to get help for his child. The uncontradicted record indicated pleas of help from a Dr. Jones, MR. GOLDEN's congressman, the governor, a local judge (who then recused himself from the case for being a witness), the Hank Snow foundation, a doctor, the National Child Abuse Foundation and the local Human Services Department. All of the agencies, in responsive correspondence submitted at the hearing, referred MR. GOLDEN to the local Human Services Department. The Human Services Department sent a friend or acquaintance of MRS. GOLDEN's to investigate the situation and closed the case.

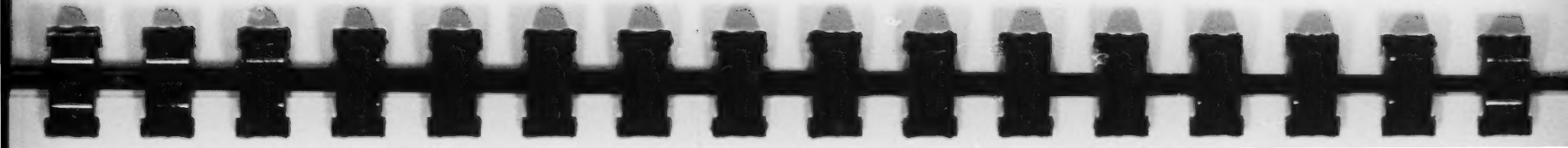
After completely exhausting his resources in Franklin County, Tennessee and after realizing that the authorities would not take any action against Lonnie Taylor or CANDIE GOLDEN to protect the child and after realizing it would be impossible to get a fair hearing there, STONEY GOLDEN left the State of Tennessee in January of 1983.

Ultimately, Appellant arrived in the State of Arizona approximately two and one half years ago and has been here since that time.

In the meantime, on January 5, 1983, based solely on the Affidavit of CANDIE GOLDEN, Judge Floyd Don Davis issued an arrest warrant for MR. GOLDEN for kidnapping. This Judge had previously represented CANDIE GOLDEN in the divorce action which gave rise to the criminal proceedings herein.

On May 4, 1985, STONEY GOLDEN was arrested in Arizona on the Tennessee arrest warrant and the minor child was placed in Child Protective Services custody here. MR. GOLDEN informed them of the history of abuse and provided them with some pictures. At that time, Mr. Gregory Hayes gave MR. GOLDEN until 5:00 P.M. on May 7, 1985 to obtain a Temporary Restraining Order.

At 4:51 P.M. on May 7, 1985, Judge Pro Tem Margaret Houghton of the Arizona Superior Court signed an Order restraining MRS. GOLDEN from taking custody of the child and granting temporary custody to MR. GOLDEN. Judge Houghton telephoned Child Protective Services. At that time, the child had not yet been released. MRS. GOLDEN and her attorney, Edward Linden, Lonnie Taylor and Child Protective Services



received actual notice of the Order. MRS. GOLDEN was informed that a hearing under Arizona law could be obtained within two days and that she could not take the child unless and until the Order was dissolved.

Between 5:00 P.M. - 6:00 P.M., before a hearing on the merits could be held, in knowing and willful contemptuous violation of the Arizona Order, Lonnie Taylor and CANDIE GOLDEN fled across state lines with the minor child by taxi-cab to Texas. MRS. GOLDEN advised her attorney, by telephone, that she would not return to the State of Arizona.

Ultimately, a Petition for Contempt was filed against CANDIE GOLDEN and Lonnie Taylor. Service of the Contempt Petition was effectively served on Mr. Linden. Service of the Contempt Petition on Mr. Taylor was effectuated. However,

the attorney for MR. GOLDEN in Tennessee, has to date refused to send the affidavit due to threats allegedly from the "D.A."

The evidence adduced at the domestic hearing indicated that in preparation for this hearing, witnesses and potential lawyers for Appellant had been threatened. The Sheriff of Franklin County had informed Appellant's parents that he could not guarantee STONEY GOLDEN's safety if he returned there.

At one point, MRS. GOLDEN and Lonnie Taylor posed as law enforcement officials in Dyer, Texas to effectuate an invalid warrant to bring back some of the Golden's relatives to Tennessee on Conspiracy to Kidnap charges. The Texas Sheriff recognized the imposters for what they were and ordered them out of his jurisdiction. Nevertheless, the Goldens' relatives had to appear in Tennessee and

post bond on these charges in front of the same judge issuing the warrant in this case.

Even before MR. GOLDEN was discovered in the State of Arizona, his attorney, Mr. Denty Cheatham, communicated with the County Attorney there about all of the problems that have been described in this hearing. He requested that a neutral forum be used to address the issues. The request was refused.

A hearing on whether the Temporary Restraining Order should be made permanent was heard by the Honorable Judge Pro Tem Raner Collins on May 17, 1985. On August 8, 1985, he ruled that Arizona did not have jurisdiction to grant custody in MR. GOLDEN. That ruling is on appeal with this Court. MR. GOLDEN was incarcerated on August 9,1985 for

purposes of extradition to the State of Tennessee on the charge of kidnapping as specified in the Tennessee arrest warrant. MR. GOLDEN was held without bond from August 9, 1985 to February 7, 1986. A Writ of Habeas Corpus was filed by MR. GOLDEN's attorneys on August 16, 1985. After a hearing on August 30, 1985, the Writ of Habeas was denied. A Notice of Appeal from the Denial of Writ of Habeas Corpus was filed on August 30, 1985. A Stay of Execution of the extradition proceedings was sought and obtained on September 3, 1985 pending appeal. A Motion for Bail was filed on November 27, 1985 by MR. GOLDEN's attorneys; that Motion was denied on January 9, 1986. Upon Stipulation and Order for release, MR. GOLDEN was released on bond pending exhaustion of his remedies on February 7, 1986.

MR. GOLDEN sought relief from Denial of the Writ of Habeas Corpus by the trial judge on appeal. On May 22, 1986 the Arizona Court of Appeals rendered its opinion, denying relief to MR. GOLDEN.

A Petition for Review was filed with the Arizona Supreme Court which in turn denied review on October 5, 1986.

Reasons for Granting the Writ

Petitioner believes that the state court of appeals in this case by its ruling has decided a important questions of federal law which have not been, but should be, settled by this Court.

A. The arrest warrant was jurisdictionally defective because it was issued by a judge who has a personal interest in the outcome of the proceedings thereby violating Petitioner's fundamental federal

Constitutional rights of due process under the Fourth and Fourteenth Amendments.

This Court has long held inviolate the principle that the person issuing an arrest or search warrant must be a "neutral and detached Magistrate." Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367 (1948). It is the very essence of our system of law and is unassailable without attacking our system of law as we know it today.

The Supreme Court in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963) described the rationale specifically when it stated:

> "The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause...To hold that an officer may act in his own, unchecked discretion upon

> information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant,would subvert this fundamental policy." Wong Sun, supra at page 414.

To hold otherwise would create havoc with our system of justice:

> "The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice.'" Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879. Wong Sun, supra, at page 413.

See also, Chadwick v. Tampa, 407 U.S. 345, 92 S.Ct. 2119 (1972) [where the United States Supreme Court held that an issuing Magistrate must meet two tests: he must be neutral and detached and he must be capable of determining whether probable cause exists for the requested arrest.]

The requirement of neutrality is so

deeply entrenched as a penumbral constitutional right that it has been held on numerous occasions that a a magistrate must avoid even the appearance of impropriety. For example, In re Murchison, 349 U.S. 133, 75 S.Ct. 623 (1955), The United States Supreme Court ruled that the fact that the same judge who had sat as the "judge-grand jury" before which witnesses had testified presided at a contempt hearing wherein witnesses were adjudged in contempt or their conduct before the "one-man grand jury" constituted a violation of due process. In making this ruling, the Supreme Court acknowledged the time-honored rule that a fair trial in a fair tribunal is a basic requirement of due process and requires an absence of actual bias by the judge. See In re Murchison, supra, 75 S.Ct. at page 625. The Court

reasoned that the judge here would have gained personal knowledge to which he would not otherwise be privy and that the State would have the benefit of the judge's personal knowledge. Id., at page 627.

To this end "no man is permitted to try cases where he has an interest in the outcome." Id. at page 625. This is true even if it "may sometimes bar trial by judges who have no actual bias." Id. at page 625. Rather, "justice must satisfy the appearance of justice." Id. at page 625.

Judge Floyd Don Davis signed the arrest warrant charging the Petitioner with kidnapping. The arrest warrant was signed by Judge Davis solely upon the affidavit of CANDIE GOLDEN. Before becoming a judge, Mr. Davis served as CANDIE GOLDEN's attorney in divorce

proceedings against STONEY GOLDEN. As such, he was personally embroiled in the civil litigation which gave rise to the criminal proceedings herein as an advocate for the same affiant who asked him to sign the arrest warrant. It is astonishing that Judge Davis did not recuse himself from the case. By signing the arrest warrant based on the affidavit of his former client, he committed the worst type of judicial impropriety. Indeed, Judge Davis was privy to a much more personal kind of information than that condemned by the Supreme Court in In re Murchison, supra when he took the word of his former client in signing the arrest warrant.

The Arizona Supreme Court has also condemned such actions. See for example, State v. Brown, 124 Ariz. 97, 602 P.2d 478 (1979) when it reversed the

conviction of a defendant because of the conduct of a judge which gave and appearance of a hostile feeling or spirit of ill will towards the defendant:

> "A judge must be careful never to act in the dual capacity of judge and advocate..." State v. Brown, supra, 124 Ariz. at page 100.
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> ***
>
> "A judge should avoid even the appearance of partiality, Taylor v. Hayes, 418 U.S. 488, 94. Sct. 2697, 41 L.Ed. 2d 897 (1974); ABA Standards, supra, Section 1.7.

See also, Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11 (1954). [where even personal embroilment by the judge with counsel which arose during the trial was condemned as a denial of due process]; Connally v. Georgia, 429 U.S. 245, 97 S.Ct. 546, 50 L.Ed.2d 444 (1977) [where the Supreme Court held that one who has a direct, personal, substantial, or pecuniary interest in the issuance of a

warrant does not qualify as a neutral, detached, disinterested Magistrate.]

A case similar to Mr. Golden's is Merritt v. Hunter, 575 P.2d 623 (Oklahoma Supreme Court, 1978). In Merritt, supra, an Oklahoma Judge refused to disqualify himself in connection with the pending child custody proceedings. The Judge had previously testified in a Kansas court during a hearing on a Petition for a Writ of Habeas Corpus in connection with the case. His testimony was limited solely to identifying the original Oklahoma Court file and explaining Oklahoma law to the Kansas Judge. Despite this limited involvement, the Oklahoma Supreme Court held that the Judge had abused his discretion when he refused to disqualify himself in the pending custody proceeding.

Surely the involvement of Judge Davis

in this case is far more substantial than the judge's involvement in Merritt, supra,. Judge Davis had actually formed an attorney-client relationship with the complaining witness and could not serve as a fair and impartial judge.

B. The denial of the Petitioner's Petition for Writ of Habeas Corpus and granting of the extradition request was prejudicial error because the arrest warrant was fatally defective in that it is being prosecuted by a county attorney who has a direct and personal interest in the outcome thereby violating Petitioner's fundamental Constitutional rights.

The bias of a prosecutor bears the same stigma that the bias of a judge does in the context of constitutional guarantees. CANDIE GOLDEN is represented by Ben Lynch. Ben Lynch is in

partnership with his brother, Mike Lynch. Mike Lynch is also the District Attorney of Franklin County. The District Attorneys' office, headed by William Pope, is extraditing the Petitioner. Mike Lynch is heading the prosecution.

The constitutional doctrine of separation of powers prohibits a prosecutor from prosecuting a case in which he has a special interest. See Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967); Young v. State (Fla. App. 1965), 177 So.2d 345; State v. Leigh, 178 Kan. 549, 289 P.2d 774 (1955); Corbin v. Broadway, 6 Ariz. App. 436, 433 P.2d, 289; Sinclair v. State, 278 Md. 243, 363 A.2d 468 (1976); Annot., 31 A.L.R. 3d 953, 963-978.

Indeed the same fundamental constitutional principles of due process that require a judge to be neutral and

disinterested also require that a prosecutor be neutral and disinterested. As the California Supreme Court stated in People v. The Superior Court of Contra Costa County, 137 Cal. Rptr. 476, 561 P.2d 1164:

> "Nor should a prosecutor try a defendant with whom he is embroiled in civil litigation." Contra Costa, supra at page 1168.
>
> ***
>
> A fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law. (U.S. Const., 5th and 14th Amends....It is the obligation of the prosecutor, as well as of the court, to respect this mandate. (Berger v. United States (1935) 295 U.S. 78, 88, 55 s.Ct. 629, 79 L.Ed. 1314..."Contra Costa, supra, 561 P.2d at page 1171.

See People v. Conner, 34 Cal.3d 141, 666 P.2d 5 (Cal. Sup. 1983) [where the California Supreme Court mandated that a district attorney may prosecute vigorously but the accused and the public

have a legitimate expectation that his zeal will be born of objective and impartial consideration of each case].

The District Attorney's Office in Franklin County is well aware of the conflict and is aware that it should recuse itself.

In this case, the prosecutor's brother represents Mr. Golden's ex-wife. The prosecutor and his brother are also in private practice together. To honor an arrest warrant based on a conflict of interest of the highest order such as this is totally destructive of Mr. Golden's fundamental constitutional right to fairness at the most basic level. The indictment signed by William Pope should not be honored. His office has a blatant conflict of interest and is powerless to prosecute this action.

C. The arrest warrant was

jurisdictionally fatally defective because the supporting Divorce Decree upon which the crime was alleged is void.

The Divorce Decree of STONEY GOLDEN and CANDIE GOLDEN was part of the supporting documents sent by Tennessee. That Decree is invalid for the following reasons:

1. The Decree was obtained through attorney misconduct.

The Divorce Decree was signed by chancellor Tyrus Cobb. It is also signed by Joe Bean, as the attorney for CANDIE GOLDEN, and by Jerre Hood, as the attorney for MR. GOLDEN. In two prior actions for divorce which had been filed by MRS. GOLDEN against MR. GOLDEN, Joe Bean represented MR. GOLDEN. Mr. Bean obtained confidential information the course of his representation of MR. GOLDEN and later was able to use that

information against MR. GOLDEN when he switched sides and began representing CANDIE GOLDEN in her action for divorce against STONEY GOLDEN.

The final time CANDIE GOLDEN filed for divorce, she hired Mr. Bean because her attorney, Floyd Davis, had become a Judge. Mr. Bean ended his representation of STONEY GOLDEN and literally switched sides.

Under the ethical standards of any state, this behavior by an attorney is absolutely inexcusable. In Arizona, E.R. 1.9 would prevent this conduct without the permission of the former client. MR. GOLDEN tried repeatedly to have Mr. Bean removed from the case. Mr. Bean refused and the Judge in the divorce matter took no action to have Mr. Bean removed. A State Bar investigation was begun in Tennessee <u>after</u> the divorce was final.

Mr. Bean, however, died during the course of the Bar investigation before it was completed.

2. The Divorce Decree was invalid because Tennessee had no jurisdiction to render the Decree.

Significantly, there was no finding of jurisdiction in the Divorce Decree giving rise to the criminal proceedings in this case. Nor could there be a finding of jurisdiction because the Tennessee Court was completely without any jurisdiction whatsoever to render a divorce decree, let alone a custody decree when CANDIE GOLDEN had been there less than twenty-four hours. The Decree was void under Tennessee's own law, under the Federal Parental Kidnapping Act, 28 U.S.C.A. 1738(A) and Arizona certainly should not give full faith and credit to it.

A.R.S. 8-413 provides a launching point for determining when it will recognize out-of-state custody decrees:

> "The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this chapter or which was made under factual circumstances meeting the jurisdictional standards of the chapter, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this chapter."

Even more important, however, is the application of the Federal Parental Kidnapping Prevention Act of 1980 (hereinafter referred to as the PKPA), 28 U.S.C. Section 1738(A).

The PKPA interprets all decrees of every state entered after December 28, 1980. Since the Tennessee Decree was entered after December 28, 1980, the Tennessee Court had a duty to enter its

Decree and custody order in accordance with the standards enacted in that Act.

That act establishes a policy of federal pre-emption in the area of custody jurisdiction:

> 1738(A) Full faith and credit given to child custody determinations
> (a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection 9f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

Even Tennessee recognizes this:

> "As a federal jurisdictional statute, the PKPA establishes a policy of federal pre-emption in the area of custody jurisdiction. Consequently, under the Supremacy Clause of the United States Constitution, the PKPA takes precedence over either the Tennessee of New York Law and must be first consulted in determining jurisdiction in custody disputes." See Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132, 138, 139, 96 S.Ct.

2548, 2552, 49 L.Ed.2d 396 (1976)... Voninski v. Voninski, 661 S.W.2d 872, 876 (Tenn.App. 1982).

28 U.S.C. Section 1738(A) provides that Arizona (and every other state) should enforce the custody decrees of other states if those decrees are rendered in accordance with the laws of the state rendering the order and the standards defined in the federal act are met:

> (c) A child custody custody determination made by a court of a State is consistent with the provisions of this section only if--
>
> (1) such court has jurisdiction under the law of such State; and
> (2) one of the following conditions is met:
> (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live

in such State;

B.(i) It appears that no other state would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with this state other than mere physical presence in such State, and (II) there is available in this such state substantial evidence concerning the child's present or future care, protection, training and personal relationships.

C. The child is physically present in such state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse.

D. (i) It appears that no other state would have jurisdiction under subparagraph (A), (B), (C), or (E), or another state has declined to exercise jurisdiction on the ground that the state whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction; or

E. The court has continuing

> jurisdiction pursuant to subsection (d) of this section.

The PKPA defines "home state" as follows:

> 1738(A)(b)(4): "Home State: means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

Tennessee did not have jurisdiction under its own laws to render the initial custody Decree because the parties had been residing in Florida for the previous 10 months and Florida would have been the only acceptable jurisdiction.

In this judicial maze, the federal act directs one straight back to state law since the first of the jurisdictional prerequisites of the PKPA is that the state court have jurisdiction under its

own law.

An analysis of Tennessee statute and state law compels one conclusion: Franklin County was acting totally without jurisdiction when it accepted jurisdiction of the initial custody petition on May 22, 1982.

The facts constituting jurisdiction must be determined on May 22, 1982, the date of filing the Petition, not the date of rendition of the custody decree. Boyd v. Boyd, supra at page 738.

On May 22, 1982, CANDIE GOLDEN and CHASEY GOLDEN were within the State of Tennessee for less than one day and without the permission or knowledge of STONEY GOLDEN. All three had lived, worked and owned an interest in the family jewelry store in Florida. Such Florida residence had been maintained for 10 months prior to May 22, 1982. Under

these circumstances, Tennessee was compelled by its own law and statutes to decline jurisdiction.

To even file a Petition for Dissolution of Marriage, one must have been a resident of the State of Tennessee for more than six months prior to the filing of the Petition:

> 36-4-104. Residence requirements (a) A divorce may be granted for any of the aforesaid causes if the acts complained of were committed while the plaintiff was a bona fide resident of this state or if the acts complained of were committed out of this state and the plaintiff resided out of the state at the time, if the plaintiff or the defendant has resided in this state six (6) months next preceding the filing of the complaint.

With respect to child custody, Tennessee at the time of the filing of the underlying Petition, and now, had in effect its own version of the Uniform Child Custody Act.

Tennessee, by its own

interpretation of this statute, relied heavily on the "home state" of the child in determining jurisdiction over custody disputes. Tennessee defines "home state as follows:

> 36-6-202: (5) Home state means the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parent, for at least six (6) consecutive months...

Tennessee itself acknowledges that Tennessee and the PKPA has established a clear preference for "home state" jurisdiction. See, Voninski, supra, 661 S.W.2d at page 877:

> "We believe that the language of the Tennessee Act, like that of the PKPA, establishes a preference for home state jurisdiction in interstate custody disputes." Voninski, supra at page 878.

Further, Tennessee also acknowledges that the PKPA does not contemplate that jurisdiction may exist

concurrently in a home state and a state with significant connections:

> The Act does not contemplate that jurisdiction may exist concurrently in a "home state" and a state with significant connections. If another state has satisfied the definition of "home state" set out at T.C.A. 36-1302(5), that state may assert jurisdiction to the exclusion of Tennessee even if Tennessee has significant connections and it is in the child's best interest that Tennessee courts assert such jurisdiction. Boyd v. Boyd, 653 S.W.2d 732 (Tenn. App. 1983) at page 737.

Indeed the Tennessee Act specifically allows the factors of the child and at least one contestant having a significant connection with the State and the best interests of the child to be significant only when no other state has jurisdiction. See the Tennessee Act, 36-6-203 (1)(2)(A)(B)(C)(D). In this respect it is like the PKPA.

The Tennessee Court in Finney v. Finney, 619 S.W.2d 130 (Tenn. App.1981)

made this clear when it stated:

> While the Tennessee Child Custody Act, as we have heretofore stated, is substantially similar to the Uniform Act, our legislature did not see fit to include language from the model act permitting jurisdiction when "it is in the best interests of the child that a court of this State assume jurisdiction because...the child and his parents, or the child and at least one contestant, have a significant connection with this State..." Uniform Child Custody Jurisdiction Act (U.L.A. Section 3(a)(2)(i)
>
> T.C.A. Section 36-1303 is the jurisdictional section of the Tennessee Child Custody Act, and, unlike the model Act, the best interest of the child is not a jurisdictional factor pursuant to T.C.A. Section 36-1303.
>
> While the child was physically present in Tennessee when the instant suit was filed, the proof is clear that Tennessee was not the child's "home state" when suit was filed." Finney, supra, 619 S.W.2d at pages 132-133.

Because of this, even the Tennessee courts acknowledge that the effect of the Tennessee Child Custody Act is to

severely limit the ability of Tennessee courts to make custody dispositions. See, Finney, supra at page 132.

Florida, in its version of the Uniform Child Custody Act embraces the doctrine of jurisdiction in the "home state". Section 61.1306 states as follows:

> 61.1308 Jurisdiction:
>
> (1) A court of this state which is competent to decide child custody has jurisdiction to make a child custody determination by initial or modification decree if,
>
> (a) This state:
>
> (1) Is the home state of the child at the time of commencement of the proceeding.
>
> Home state is defined as follows:
>
> 61.1306 (5) "Home state" means the state in which the child, immediately preceding the action involved, lived with his parents, a parent, or a person acting as parent for at least six consecutive months...
>
> Florida also has and had at the

time a six month residency requirement for filing for divorce.

In this case, CANDIE GOLDEN engaged in blatant forum shopping when she left Florida in the dead of the night without consent or knowledge of STONEY GOLDEN. In the stealth of the night she went to Alabama and removed the child from her in-laws--again without the knowledge of STONEY GOLDEN. She left her home, her domicile and the place of her livelihood to go back to a forum that she thought (and it most certainly was) very friendly to her.

This is the germ of the PKPA. It is exactly the situation for which the Act was designed. If ever the protection of the Act should be invoked, it should be here. Tennessee itself recognizes this over and over again in its appellate cases. Indeed its appellate courts

appear to constantly be correcting the actions of the local county judges, who for bias, or misunderstanding of the law or whatever other reason, fail to apply the strong and overriding principles of "home state jurisdiction."

Where a court renders a decree without comporting with federal law, it is not entitled to full faith and credit. See Mitchell v. Mitchell, 437 So.2d 22 (Ala. Civ. App. 1982) and all of the other cases recited in this portion of the Petition.

If the Divorce Decree which is the basis for the kidnapping charge is jurisdictionally void, then the arrest warrant is void. How can the arrest warrant substantively charge a crime when there is no valid custody order with which MR. GOLDEN interfered?

D. The arrest warrant does not

substantively charge a crime under Tennessee Laws.

The arrest warrant charges a violation of TCA 39-2602. There was no such section as TCA 39-2602 at the time that the arrest warrant was filed. It therefore does not substantively charge a crime and is therefore jurisdictionally defective.

E. In determining whether the arrest warrant is valid for purposes of extradition, this Court should also consider the web of other improprieties surrounding the issuance of the warrant.

Although counsel for Petitioner is mindful of the Court's duty not to try the guilt or innocence of MR. GOLDEN at this stage, it is difficult to decide the jurisdictional issues in a vacuum. The conflicts of interest have not occurred in isolation. The mistakes and problems

alleged with the arrest warrant are not 'mere technicalities'. The cumulative picture demonstrates one deliberate, calculated scheme to have MR. GOLDEN tried and effectively effectively hung without due process or any guarantee of his safety. If the arrest warrant is jurisdictionally void for any reason, our statutes and the federal constitutional principles implementing those statutes certainly permit this Court to say no to this injustice.

Conclusion

The arrest warrant issued from the State of Tennessee for STONEY GOLDEN is fatally defective in light of the fact that it was issued by a judge who formerly represented CANDIE GOLDEN in domestic proceedings wherein STONEY GOLDEN was the opposing party. Such action grossly violates STONEY GOLDEN's

rights of due process under the Fourth and Fourteenth Amendments of the United States Constitution and the concomitant requirement that a warrant be issued by a detached and neutral magistrate.

Moreover, the assault on Petitioner's fundamental Constitutional rights has been exacerbated by the fact that the district attorney who is prosecuting the case against him, also happens to be in private law practice with his brother, the latter of whom represents CANDIE GOLDEN.

Further, since MRS. GOLDEN was only present in the State of Tennessee for a period of hours before the Complaint for Divorce was filed, the six month jurisdictional requirement was not met. For such reason the Decree which determined custody and, upon which the subsequent criminal proceedings against

STONEY GOLDEN depended was null and void. In addition, the arrest warrant could not substantively charge the crime it did since the section of law allegedly violated by MR. GOLDEN in the warrant was not in effect at the time of the warrant's issuance.

Not only for these reasons should this Court issue a Writ of Certiorari to review the decision of the Arizona Supreme Court, but also to defeat the "backwoods justice" which has prevailed thus far.

Respectfully submitted,

Armand Salese*
Kathleen McCarthy
Salese & McCarthy, P.C.
124 W. Cushing Street
Tucson, Arizona 85701
(602) 623-0341
Attorneys for Petitioner

*Counsel of Record

APPENDIX A

SUPREME COURT

October 8, 1986

RE: STONEY GENE GOLDEN vs. CLARENCE W. DUPNIK
Supreme Court No. CV-86-0461-PR
Court of Appeals No. 2 CA-CIV 5544
Pima County No. H-1020

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 7, 1986, in regard to the above-referenced cause:

ORDERED: Petition for Review - DENIED

Record returned to Court of Appeals, Division Two, Tucson, this 8th day of October, 1986.

DAVID R. COLE, Clerk

TO:

Kathleen A. McCarthy, Esq.
Stephen D. Neely, Pima County Attorney - Attn: Paul E. Tang
Joyce Goldsmith, Clerk, Court of Appeals, Division Two

des

APPENDIX B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

2 CA-CIV 5544
DEPARTMENT A

PIMA County
Superior Court
Cause No. H-1020

STONEY GENE GOLDEN	)	
	)	
Petitioner/Appellant,	)	
	)	
and	)	
	)	
CLARENCE W. DUPNIK, Sheriff of Pima County, Arizona,	)	ORDER
	)	
Respondent/Appellee,	)	
	)	
and	)	
	)	
THE STATE OF ARIZONA,	)	
	)	
Real Party in Interest	)	

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its OPINION.

IT IS ORDERED that the OPINION be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the OPINION be sent to each party appearing herein or the attorney for such party and to the Honorable Thomas Meehan, Judge Pima County Superior Court.

DATED this 22nd day of May, 1985.

James D. Hathaway
Chief Judge

The foregoing directives were complied with May 22, 1986 by mailing the required to:

Kathleen A. McCarthy
124 West Cushing Street
Tucson, Arizona 85701

Stephen D. Neely, Pima County Attorney
Paul Tang
900 Court Building
100 West Congress
Tucson, Arizona 85701

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STONEY GENE GOLDEN, Petitioner/Appellant, v. CLARENCE W. DUPNIK, Sheriff of Pima County, Arizona, Respondent/Appellee. and THE STATE OF ARIZONA, Real Party in Interest,	)	2CA-CIV5544 DEPARTMENT A OPINION

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. H-1020

Honorable Thomas Meehan, Judge

AFFIRMED

Kathleen A. McCarthy Tucson

Attorney for Petitioner/Appellant

Stephen D. Neely, Pima County Attorney
by Paul Tang Tucson

Attorneys for Real Party in Interest

H A T H A W A Y, Chief Judge

Appellant contests the trial court's denial of his writ of habeas corpus. On May 21, 1982, Candie Golden, then-wife of appellant Stoney Golden, filed for divorce and sought custody of their minor child in Tennessee. The parties were divorced on August 20, 1982. Appellant claims the Tennessee court did not have jurisdiction under its own laws to grant the divorce.

Alleging that the child had been abused, appellant left Tennessee with the child in January 1983, in violation of the custody order. He arrived in Arizona approximately 1-1/2 years ago, where he has remained since that time. On January 5, 1983, relying solely upon the affidavit of appellant's ex-wife, Judge Floyd Don Davis issued a warrant for appellant's arrest for kidnapping. In May 1983,

appellant was indicted by a Tennessee grand jury on the same kidnapping charge. On May 4, 1985, appellant was discovered in Arizona by his ex-wife and the child was placed in child protective service custody here. On May 7, 1985, appellant obtained a temporary restraining order allowing the child to remain in Arizona. In violation of that order, Candie Golden fled the state with the child. In domestic proceedings below, appellant was denied custody on jurisdictional grounds. That ruling is currently pending in another appeal.

On May 4, 1985, appellant was arrested by Arizona authorities and on June 28, 1985 the Governor of Tennessee sought extradition of appellant on the kidnapping charges. The Governor of

Arizona issued an extradition warrant and appellant was jailed on August 9, 1985, pending extradition to Tennessee. On August 30, 1985, a hearing was held on appellant's petition for a writ of habeas corpus. The trial court denied the writ. A stay of execution of the warrant was obtained on September 3, 1985, pending this appeal.

Appellant raises five issues on appeal: (1) the arrest warrant is jurisdictionally fatally defective and was issued by a judge who has a personal interest in the outcome of the proceedings thereby violating appellant's fundamental federal constitutional rights on extradition; (2) the arrest warrant was jurisdictionally fatally defective in that it is being prosecuted by a county

attorney who has a direct and personal interest in the outcome thereby violating appellant's fundamental constitutional rights; (3) the arrest warrant was jurisdictionally fatally defective in that the supporting divorce decree and custody order upon which the crime was alleged are void; (4) the arrest warrant does not substantively charge a crime under Tennessee law; (5) this court should consider the web of other improprieties surrounding the issuance of the warrant.

I. THE ARREST WARRANT

The Extradition Clause of the United States Constitution provides:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled,

> be delivered up, to be removed to the State having Jurisdiction of the crime." Art. IV, Sec. 2

To implement the above provision of the constitution, the Congress has enacted 18 U.S.C. Section 3181, et seq. and many states, including Arizona and Tennessee, have adopted the Uniform Criminal Extradition Act. See A.R.S. Section 13-3841, et seq and TCA Sections 40-9-101 through 40-9-130. Pursuant to the Act, the governor of the demanding state (in this case Tennessee) demands extradition from the governor of the asylum state (in this case Arizona). A.R.S. Section 13-3843. The demand must be in writing and accompanied by the indictment or information or by an affidavit made before a magistrate. The governor of the asylum

state may investigate the charges and if he decides the demand should be complied with he issues a warrant. A.R.S. Sections 13-3846 and 13-3847.

The Supreme Court has held that once the governor of a state grants extradition, such grant becomes prima facie evidence that the constitutional and statutory requirements for extradition have been met and this court has but a limited review. We can do no more than decide whether (a) the extradition documents on their face are in order; (b) the petitioner has been charged with a crime in the demanding state; (c) the petitioner is the person named in the request for extradition, and (d) the petitioner is a fugitive. Michigan v. Doran, 439 U.S. 282, 99 S.Ct. 530, 58

L.Ed.2d 521 (1978). There is no doubt that the above criteria have been met in the present case.

Appellant argues, however, that the issue whether a neutral magistrate signed the original arrest order is also open for review. The Doran case substantiates this view. In Michigan v. Doran, supra, the court stated:

> "In short, when a neutral judicial officer of the demanding state has determined that probable cause exists, the courts of the asylum state are without power to review the determination." 439 U.S. at 289, 99 S.Ct. at 536.

That statement in Doran has been interpreted to allow the reviewing state courts to determine whether there has been a finding of probable cause by a neutral

judicial officer. The inquiry may be made in addition to the four criteria listed above. Zambito v. Blair, 610 F.2d 1192 (4th Cir. 1979); United States v. Pennsylvania State Police, 548 F.Supp. 9 (E.D. Pa. 1982). See also, Crew v. State of Connecticut, 40 Conn.Supp. 179, 486 A.2d 664 (1984); Application of O'Riordan, 7 Kan.App. 460, 643 P.2d 1147 (1982).

In this case, appellant has provided conclusively that the original arrest warrant was not signed by a neutral magistrate. He has presented evidence that the same magistrate who signed the arrest order also represented appellant's ex-wife in 1981 and 1982 in two divorce actions against appellant. Those circumstances clearly violate the neutral

judicial officer requirement. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Unfortunately for appellant, the arrest warrant, though void in this case, was also superfluous. Both A.R.S. Section 13-3843(B) and 18 U.S.C. Section 3182, require only that an indictment or affidavit made before a magistrate accompany the demand for extradition. In this case, appellant was indicted before a grand jury a number of months following the issuance of the arrest warrant. Since all that was needed was the indictment, the arrest warrant is irrelevant. See Bruzaud v. Matthews, 93 App.D.C. 47, 207 F.2d 25 (1953). We are not permitted to examine whether the grand jury had

sufficient probable cause to issue the indictment. See Michigan v. Doran, supra. Therefore, the extradition papers were in order.

II. PROSECUTORIAL BIAS

Appellant alleges that the prosecutor in Tennessee is biased and has an interest in this case. It has been specifically held that on issuance of a governor's warrant for extradition, the motives of a prosecutor cannot be considered. McDonald v. Burrows, 731 F.2d 294 (5th Cir. 1984); see also, Michigan v. Doran, supra, and Pacileo v. Walker, 449 U.S. 86, 101 S.Ct. 308, 66 L.Ed.2d 304, reh. den. 450 U.S. 960, 101 S.Ct. 1421, 67 L.Ed.2d 385 (1980).

III. JURISDICTIONALLY FATAL INDICTMENT

Appellant argues that the divorce and custody decree entered in Tennessee was void and therefore he could not have kidnapped his son in violation of the void decree. His argument is premised on the fact that his wife did not meet the six month residency requirement of Tennessee law for divorce. See TCA Section 36-4-104. This is not the proper forum in which to bring that argument. The proper forum is the State of Tennessee. We are not permitted in this review to consider the guilt or innocence of appellant. Nor may we consider a collateral attack on the decree. See Michigan v. Doran, supra.

IV. WARRANT CHARGING WRONG CRIME

Appellant argues that his arrest

warrant charged a violation of TCA Section 39-2602, a statute that was not in existence at the time of his indictment. Appellant does not argue that no such kidnapping law exists in Tennessee. The indictment and arrest warrant both put appellant on notice of the charges against him.

V. OTHER IMPROPRIETIES

Appellant argues that this court should consider other improprieties that have occurred in the State of Tennessee. There is case law to the effect that this court upon issuance of a governor's warrant for extradition may inquire into malice of the prosecutor and charging parties. See Annot. 94 A.L.R. 1493 (1935). In light of the more recent Doran

case, however, the review of this court is strictly limited and a review of such motives is inappropriate. See Ex parte Mcdonald, 631 S.W.2d 222 (Tex.Civ.App. 1982).

Affirmed.

JAMES D. HATHAWAY, Chief Judge

CONCURRING:

Lawrence Howard,
Presiding Judge

Lloyd Fernandez, Judge